

**Note: This determination
contains an order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 343
3200359

BETWEEN	HDB Applicant
AND	FONTERRA CO- OPERATIVE GROUP LIMITED Respondent

Member of Authority:	Rowan Anderson
Representatives:	Ashleigh Fechny, advocate for the Applicant Rebecca Rendle, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	2 March 2023, 6 March 2023, and 3 April 2023 from Applicant 23 March 2023 from Respondent
Determination:	30 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] HDB was employed by Fonterra Co-operative Group Limited (Fonterra) between 16 July 2018 and 28 April 2022.

[2] HDB claims that they were unjustifiably dismissed from their employment, unjustifiably disadvantaged in their employment by Fonterra's actions in suspending

them from their employment from 3 March 2022, and that Fonterra breached its obligations of good faith.

[3] Two preliminary issues arise, firstly, as to whether HDB raised a personal grievance within the 90-day period prescribed by s 114 (1) of the Employment Relations Act 2000 (Act), and secondly, in the alternative, whether leave should be granted for the raising of HDB's personal grievance out of time on the basis of exceptional circumstances.

[4] HDB submits that they raised a personal grievance on 20 July 2022, within the statutory 90-day period, by email notification to a Fonterra Plant Manager. As it later became apparent, the email address used contained an erroneous spelling of the intended recipient's name. HDB submits that the personal grievance was raised within the statutory 90-day period because HDB took reasonable steps to make Fonterra aware of it by providing instructions to their advocate to raise the grievance. In the alternative, HDB seeks leave to raise their personal grievance outside of time on the basis of exceptional circumstances, namely a failure by their representative to ensure the grievance was raised within the required time.

[5] HDB also seeks a non-publication order as to their identity.

[6] Fonterra submits that HDB did not raise a personal grievance within the statutory 90-day period, it does not consent to the raising of the personal grievance out of time and submits that there are no exceptional circumstances warranting the granting of leave for the personal grievance to be raised out of time.

Non-publication orders

[7] HDB seeks non-publications order as to their identity. The basis on which the orders are sought include HDB's concern that publication may result in adverse health outcomes and that, having regard to the subject matter relating to HDB's substantive claims (including matters related to COVID-19), that publication of their identity would result in a significant risk of public opprobrium. Additionally, HDB is concerned about implications on their current and future employment prospects arising from publication.

[8] Fonterra consents to the non-publication of the HDB's medical records and vaccination status. It otherwise takes a neutral approach to the orders sought.

[9] I am satisfied that the making of non-publication orders is appropriate. I consider there is a potential risk of harm arising from the identification of HDB's identity, including as to their current employment, and their future employment prospects. Additionally, I accept that there is a significant risk of public opprobrium should HDB's identity be the subject of publication. I do not consider there to be any significant wider public interest in the publication of HDB's identify.

[10] I order a prohibition on the publication of the name of the applicant and any identifying details of the applicant. This order is made pursuant to clause 10 of schedule 2 of the Act.

[11] A random generator has been used to refer to the applicant in these proceedings. HDB is a randomly generated name and does not resemble the name of the applicant.

The Authority's investigation

[12] The preliminary matters subject to consideration in this determination have been, with the agreement of the parties, dealt with 'on the papers' based on affidavit material and written submissions.

[13] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Did HDB raise a personal grievance in accordance with s 114(1) of the Act?

[14] Section 114(1) of the Act requires an employee wishing to raise a personal grievance to do so within 90 days of the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

[15] What is required in terms of the raising of a personal grievance is dealt with at s 114(2) of the Act, which provides as follows:

- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[16] The content of the relevant letter setting out HDB's personal grievance, sent on 20 July 2022, is not the subject of dispute in that, if received at the relevant time, it would clearly have constituted the raising of a personal grievance. Given that is

uncontentious, I proceed to consider whether the personal grievance was otherwise raised within time.

[17] I note at this point, by way of background, that the relevant 90-day period expired on 27 July 2022. It is uncontentious that two emails were sent to the incorrect email address absent any other notification to Fonterra within the 90-day period. The relevant emails were sent on 20 and 25 July 2022. A further follow up email was sent by HDB's representative on 10 August 2022, outside of the 90-day period. However, on that occasion Fonterra's Employment Relations Manager was copied to the correspondence which resulted in the further exchange of emails as to whether a personal grievance had been raised within the 90-day period.

HDB's position

[18] HDB submits that the personal grievance was raised within the 90-day period on the basis that HDB took reasonable steps to raise the grievance and that the email address to which the notification was sent was owned by Fonterra. In support of that submission, HDB says that the email was received by Fonterra's servers as it was sent to an email address with the "@fonterra.com" domain name, and that no bounce back email was received recording that the email sent was undeliverable.

[19] HDB also submits, for the purposes of s 114(2) of the Act, that HDB raised the personal grievance within the 90-day period by taking reasonable steps to make Fonterra aware that they alleged a personal grievance they wanted Fonterra to address. HDB says that s 114(2) of the Act applies where reasonable steps have been taken, and impliedly, where there has been a 'reasonable failure' such as where an employee has incorrectly identified an employer.

Fonterra's position

[20] Fonterra submits that the email address to which the letter was sent was invalid, that it does not send "undeliverable" email notifications for cyber security reasons, and that the emails sent to the incorrect address were 'dropped' by Fonterra's email gateways and were not received by Fonterra's server. Fonterra also submits reasonable steps were not taken to make the employer aware of the grievance, including because errors in the draft correspondence as to the spelling of the intended recipient's name were not identified, and that there was no follow up despite confirmation of receipt having been requested when the initial email was sent but no response received.

Discussion and analysis

[21] One point of contention is that following the sending of the relevant emails no automatic response advising that the email was undeliverable was received. HDB asks the Authority to accept that such responses are so standard that judicial notice should be taken. I do not accept that is the case and I accept the submissions made by Fonterra as to that approach not being universal. Fonterra's submissions were supported by evidence from their Chief Information Security Officer, evidence which I accept, including as to the cyber security reasons underlying Fonterra's systems and processes.

[22] HDB's advocate referred to *Ceres New Zealand Limited v DJK*¹ as supporting the proposition that a personal grievance is raised when the relevant communication reaches the employer, as opposed to when the recipient chooses to open a letter or read an email. Fonterra submits, and I accept, that that case can be distinguished in that grievance notification in that case was received at the relevant physical address but remained unopened for a period of time. The circumstances are not analogous to the circumstances in the present case where HDB's representative, in error, sent the relevant correspondence to an incorrect email address that was not monitored.

[23] I record at this point that I accept the evidence of Fonterra's Chief Information Security Officer as to unsolicited emails being 'dropped' instead of being responded to with a 'non delivery reply' and that the relevant emails would not have been received by any Fonterra employee. No evidence to the contrary has been received by the Authority. I would not have considered acceptance of the relevant emails by Fonterra's servers relevant, at least in the absence of fault on its part, in the absence of evidence that the emails were actually monitored by another employee or forwarded to the intended recipient.

[24] HDB referred to two cases² as being 'established precedent on the section'. Both cases involved grievances 'submitted' in the context of the former Employment Contracts Act 1991. HDB submits that, where reasonable steps have been taken by an employee, s 114(2) impliedly operates where there has been a 'reasonable failure', such as the misidentification of an employer. I do not accept that submission and the two

¹ *Ceres New Zealand Limited v DJK* [2020] NZEmpC 153 (*Ceres*).

² *Wilkinson v ISL Computer Systems Limited* [1993] 1 ERNZ and *Forever Living Limited v Kruesi* [1993] 2 ERNZ 636.

cases referred to both involved employers having been made aware of the relevant grievances within time, albeit either by communication from a third-party or via their agent, notwithstanding they were wrongly addressed. Further, s 114(2) of the Act expressly includes reference to an employer's representative.

[25] Section 114(2) of the Act is concerned with when a grievance is raised with an employer. That may occur when they are made aware, or alternatively when reasonable steps have been taken to make them aware, that the employee alleges a grievance they want addressed. In the present case, the alternative does not apply because reasonable steps were not taken to make the employer aware of the grievance. That is because the grievance was, in error, not sent to the intended recipient and no other relevant steps were taken to make them aware of the grievance.

[26] I consider s 114(2) must be read as including steps taken on behalf of an employee. To read it otherwise would suggest an employee is required to personally raise any grievance with their employer and exclude any steps taken by an employee's representative. Such an approach still accommodates for circumstances such as, for example, where a notification has been sent to the correct address for an intended recipient, but that correspondence remains unopened, or where reasonable steps have been taken to notify an employer's representative.

[27] I do not consider that, for the purposes of s 114(2) of the Act, a grievance can be said to have been raised simply because an employee has engaged a representative to raise the grievance on their behalf. The steps taken by an employee, including through their representative, may result in the employer being aware of the grievance. Alternatively, the steps taken may not result in the employer being made aware, but the grievance might otherwise be deemed to have been raised because reasonable steps taken to make the employer aware. Here, the alternative applies, but the steps taken were not reasonable steps because the grievance notification was not sent to the correct address.

[28] Where the employer has not been made aware of the grievance, and reasonable steps have not been taken, exceptional circumstances may be the reason for that. For example, when an employee has made reasonable arrangements to have their grievance raised on their behalf by an agent, and there is an unreasonable failure by the agent to ensure it is raised within time.

[29] I find that a personal grievance was not raised within the statutory 90-day period.

Exceptional circumstances

[30] HDB submits that, in the alternative, the Authority ought to grant leave for the grievance to be raised out of time on the basis that the delay in raising the grievance was occasioned by exceptional circumstances in the form of HDB's representative's unreasonable failure to ensure the email was properly sent.

[31] Section 114(4) of the Act provides that the Authority may grant leave for a personal grievance to be raised outside of the 90-day period if the Authority is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and where it considers it is just to do so.

[32] Section 115 of the Act sets out a non-exhaustive list of circumstances where exceptional circumstances exist. Relevant to this matter, the grounds for exceptional circumstances relied upon by HDB are dealt with at s 115(b), which provides as follows:³

- (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time...

HDB's position

[33] HDB submits they made reasonable arrangements to have the grievance raised by their representative, and that their representative unreasonably failed to ensure the grievance was raised within time. In doing so, submissions were made that clear instructions to raise the grievance had been provided within the relevant 90-day period and that the sending of the grievance correspondence to the incorrect email address involved an unreasonable failure on the part of the representative.

[34] Additionally, HDB, albeit in the context of their primary submissions, refers to a 'not unreasonable' failure to follow up the initial emails in circumstances where no 'undeliverable' response had been received. HDB referred, in submitting that the

³ Employment Relations Act s 115(b).

representative's failure was not an unreasonable failure, to various medical diagnosis whilst asserting that the relevant error could have been made by any representative.

[35] HDB, in reply submissions addressed the issue of whether it would be just for the Authority to grant leave and submits that any minor prejudice to Fonterra is outweighed by the implications for HDB in terms of their ability to pursue their claims.

Fonterra's position

[36] Fonterra submits that there are no exceptional circumstances, and that leave should be refused. It submits that HDB did not make reasonable arrangements for the grievance to be raised on their behalf, that they failed to reasonably check the contact details contained in draft correspondence, and that they did not check with their representative that the personal grievance had been raised until outside of the 90-day period.

[37] Fonterra further submits that, even if HDB acted reasonably, the circumstances are not exceptional. In the further alternative, Fonterra submits that it would not be just to grant leave.

Discussion and analysis

[38] I do not consider HDB's failure to identify the incorrect email address means that they did not make reasonable arrangements to have their representative raise the personal grievance within the 90-day period. HDB's evidence is that they posted relevant documents to their representative and, in effect, that following a review of the draft notification instructions were provided to have notification sent to the Plant Manager.

[39] Whilst HDB had the opportunity to review a draft notification, that does not in my view mean that they did not make reasonable arrangements to have the grievance raised by their representative, nor does the absence of any follow up by HDB within the 90-day period. I find that the error was made by the representative in circumstances where HDB had made reasonable arrangements for the representative to raise the grievance on their behalf.

[40] HDB's representative had access to all the necessary information, including the correct email address of the Plant Manager. I consider HDB was entitled to rely on the

skills and competence of their representative to have the personal grievance raised with their employer, the representative having been in receipt of the correct email address. HDB made reasonable arrangements to have the grievance raised on their behalf by their representative.

[41] To the extent any follow up was made by HDB's representative, it is apparent that the email address was not checked by them referring to the original source documents, nor were other steps taken to ensure the grievance had been raised, for example, by sending a copy to HDB's employer's registered address. HDB's representative unreasonably failed to ensure the grievance was raised within the required time.

[42] I also consider there was an unreasonable failure by the representative to ensure the grievance had been raised having regard to the absence of any confirmatory response as to receipt, the failure to check that the email address was correct when sending the second email on 25 July 2022, and in taking no other steps to ensure the grievance was raised before the expiry of the 90-day period.

[43] I find that the failure to send the personal grievance notification to the correct email address, and otherwise failing to ensure the notification was sent to the employer within the 90-day period, was unreasonable.

[44] Fonterra referred to the email attaching the personal grievance correspondence as containing a request for confirmation of its receipt. Whilst I agree that the inclusion of that request and the subsequent absence of confirmation is relevant, I consider it further supports the view that HDB's representative failed to ensure that the grievance was raised within the required time.

[45] I find that exceptional circumstances are present in terms of s 115(b) of the Act. HDB made reasonable arrangements to have the grievance raised on their behalf by their representative. HDB's representative unreasonably failed to ensure that the grievance was raised within the required time.

[46] It is not enough simply that exceptional circumstances are present, the delay in raising the personal grievance must be occasioned by the exceptional circumstances.⁴

⁴ Employment Relations Act 2000, s 114(4)(a).

The delay in raising the grievance was occasioned by those exceptional circumstances. Whilst HDB, having been copied into the relevant emails, was aware that no response had been received, I do not consider that a basis for finding that the delay was not caused, or occasioned by, the representative's failure. HDB ultimately followed up with their representative on 10 August 2022 asking whether a response had been received. That initiated an email from their representative which led to the actual raising of the grievance by including another Fonterra employee in a further email.

[47] The email correspondence from HDB to their representative sought an update as to whether the representative had had a response from the intended recipient at Fonterra. There is no indication at all, for example by the raising of any concern in the email, that HDB thought other than that their representative had taken the necessary steps to raise the personal grievance on their behalf. Indeed, I find the email sent by HDB on 10 August 2022 indicates they were expecting a response to the personal grievance they understood had been raised.

[48] HDB's evidence is that it was not until 17 August 2022, when a response was received from Fonterra, that they became aware of the mistake. HDB at that point sought clarification from their representative as to whether the mistake meant that the grievance was "now not raised". Even after 17 August 2022 HDB was advised by their representative that it was not a problem, and that the mistake didn't mean that the grievance hadn't been raised. As at 10 August 2022, when the grievance was raised, the delay was squarely caused by the exceptional circumstances.

[49] I find the delay in raising the personal grievance was occasioned by exceptional circumstances.

Is it just to grant leave?

[50] I am satisfied that it is just to grant leave in the circumstances. I do not accept, as submitted by Fonterra, that the granting of leave would undermine the certainty provided by 90-day statutory period. The 90-day statutory period does provide a significant degree of certainty. However, the statutory scheme also expressly provides for the granting of leave where the Authority is satisfied that the delay was occasioned by exceptional circumstances and where it is just to grant leave. I am satisfied of both matters.

[51] Whilst outside of the 90-day statutory period, I consider the correspondence that was sent by HDB's representative of 10 August 2022, and the subsequent exchanges, to be relevant. Having regard to that correspondence, and the timing of it in that Fonterra were notified of the personal grievance within a short period of time after the expiry of the 90-day period, I am not satisfied that significant prejudice arises in terms of Fonterra's ability to respond to HDB's claims.

[52] Fonterra also submitted that HDB had a reasonable opportunity to raise the grievance but failed to do so. I do not accept that submission. I have found that HDB took reasonable steps to have the grievance raised on their behalf, and that their representative failed to ensure that the grievance was raised within time. Further, I do not consider Fonterra's submission as to the grievance being raised towards the end of the 90-day period as being of significance. Relevant instructions were provided within time and additionally there was ample time for follow up by HDB's representative prior to the expiry of that period.

[53] In the circumstances, I consider a significant injustice would be done to HDB should they be unable to progress their grievance. I do not consider there any significant prejudice to Fonterra in granting HDB the leave sought. Even if I were wrong about that, any such prejudice would not be such as I would reach a different finding having regard to the injustice that would be done to HDB. I am satisfied that it is just to grant the leave sought.

Conclusion

[54] I find that HDB's personal grievance was not raised within the 90-day period provided for at s 114(1) of the Act.

[55] HDB's application for leave under s 114(3) of the Act to raise the personal grievance after the expiration of the 90-day period is granted.

[56] In accordance with s 114(5) of the Act, the parties are directed to use mediation to seek to mutually resolve the grievance. The parties are directed to attend mediation to seek to resolve the grievance.

Costs

[57] Costs are reserved pending any investigation and determination of HDB's substantive claims.

Rowan Anderson
Member of the Employment Relations Authority